have received benefits from the contract; the plaintiff money and the defendant timber extracted. I should therefore follow the decision of Gill J. (as he then was) in *Tan Bing Hock* v. *Abu Samah* where he ordered that the loss must lie where it falls.

I therefore dismiss the plaintiff's claim with costs agreed at $1,000.

Claim dismissed.

Solicitors: *S. Sivasubramanian; Ten Chin Yong & Appaduray.*

ABDUL RASHID BIN MOHAMED SALLEH v. DATIN HAJJAH MAIMON BINTE HAJI HARON

[O.C.J. (Abdul Razak J.) June 25, 1979]
[Kuantan — Civil Suit No. 165 of 1975]

Company Law — Invitation to purchase shares — Company already incorporated — Promoter — Director — Whether person so inviting an agent for company — Privity of contract.

In this case the plaintiff alleged that the defendant approached and invited him to purchase shares in a company to operate a supermarket in Kuantan. The plaintiff paid $15,000 to the defendant for the shares. The company later fell into difficulties and no shares were issued. A receipt for the sum paid was issued by the company. The defendant was at the material time a director of the company.

Held: whether the defendant acted as a promoter for shares of an existing company or as a director, she was an agent for the company and there was no privity of contract between her and the plaintiff and she could not be made personally liable.

CIVIL SUIT.

S. Sivasubramanian for the plaintiff.

Ten Chin Yong for the defendant.

Cur. Adv. Vult.

Abdul Razak J.: The plaintiff alleged that the defendant approached and invited him to purchase shares in Kimberly Mail Trade Sendirian Berhad to operate a supermarket in Kuantan.

According to him, on or about August 1, 1973, he paid the defendant a sum of $10,000 by cheque and on or about September 7, 1973, a sum of $5,000 by another cheque. No share certificate was issued and the said Kimberly Mail Trade Sendirian Berhad never operated the said supermarket and had become defunct. The plaintiff had demanded the return of the $15,000 but the defendant has failed or refused to do so.

The defendant in her defence denied receiving the said sums or any part of them; alternatively, if she had, the money was not received for the use of the plaintiff or under such circumstances as would entitle the plaintiff to recover from the defendant. Further, the defendant says that, on or about August 2, 1973, the plaintiff applied in writing, to Kimberly Mail Trade Sendirian Berhad, a limited company duly incorporated, for $20,000 shares at $1 per share. Pursuant to the said application, and in part payment of the said shares, the plaintiff paid the said company two cheques for $10,000 and $5,000 dated August 2, 1973 and August 7, 1973 respectively. Both cheques were drawn in the name of Kimberly Mail Trade Sendirian Berhad by the plaintiff, for which receipts were issued. It was contended also that there was no privity of contract between the plaintiff and the defendant. The plaintiff and the defendant gave evidence on the terms set out in the above averment.

In his submission, counsel for the defendant said that there was no privity of contract between the plaintiff and the defendant, but, between the plaintiff and Kimberly Mail Trade Sendirian Berhad. He conceded that if there was a privity of contract between the plaintiff and her, she was liable to pay. He said that all the circumstances showed that the plaintiff knew that he was dealing with Kimberly Mail Trade Sendirian Berhad. He addressed his application form for shares to Kimberly Mail Trade Sendirian Berhad. The receipt for money received was issued by Kimberly Mail Trade Sendirian Berhad. The Managing Director of Kimberly Mail Trade Sendirian Berhad directed the firm's accountant to issue shares to the plaintiff. It said that the firm had got into an unfortunate situation of not being able to pay its debts and became insolvent. The case does not come within any of the exceptions to the doctrine of privity.

For the plaintiff, it was argued by counsel, that the defendant was a promoter. A person may become a promoter before or after its incorporation. It was contended that although at the relevant time the defendant was not a director, she was a promoter. He cited the principle in *Halsbury's* (at page 100 Vol. 6, 3rd ed.), that a promoter, even though he expressly purports to act as agent or trustee, is personally liable upon all contracts made with him on behalf of the *intended* company until the contract has been performed or rescinded by either party under some power in the contract, or, by consent of all parties, or, until the company has, with the consent of the other contracting party, undertaken the liability, of the promoter under the contract. For the principle to apply to the promoter, therefore, the contract by him must have been for an *intended* company, one which had not come into existence. But, it is clearly shown that the company here was incorporated on November 18, 1972 whilst the alleged contract was entered into as claimed on August 1, 1973.

The position of the promoter who purports to act on behalf of the company, *after its incorporation,* is not very clear. It is stated in principle that a company is not bound by a contract purporting to be entered into on its own behalf by its promoters or other persons before its incorporation. The company cannot, after its incorporation, ratify or adopt any such contract made before its incorporation because there is in such cases, no agency and the contract is that of the parties making it. (*Halsbury's* Vol. 6, 3rd ed. para 824). It seems to imply therefore, such contract entered into by the promoter *after its incorporation,* binds the company as if it had been entered into by it, provided that the company ratifies or adopts the contract subsequently. (*Halsbury's* Vol. 6, 3rd ed. para 417). To that extent, therefore, the promoter must be the agent of the company since it is difficult

to conceive in any other manner how in the propagation of business or economic activity, promoters could dedicate themselves to forming a company, if in so advancing it, they are put under severe constraint and anxiety as to whether their act would ultimately be sanctioned by it even after it has been incorporated and the directors appointed, when evidently the reason for them being allowed in law to exist after the company is incorporated is evidently to enable the company to get itself adequately started which without them, it could not. If we accept, therefore, the principle of ratification along those lines, then, clearly, the circumstances point to the company and not the defendant who must, if at all, be held liable for any default because whatever the defendant might have done in relation to the plaintiff, it was with the company that the plaintiff was dealing. Evidence showed that it was to the company that the plaintiff had applied for the allotment of shares. It was in the name of the company that the cheques were made out by the plaintiff. That it was in the company's account that the defendant credited the amount in the bank. It was the company's Managing Director who instructed that the share certificate be issued to the plaintiff. Under those circumstances, it is difficult to resist the conclusion that the plaintiff, to all accounts, had treated the company, and not the defendant, as being his principal and *vice versa*. It was the company who had adopted or ratified the contract and therefore, it was the company who should be the party to the suit and not the defendant.

But, even assuming that the principle of ratification does not apply to a contract entered into by a promoter after its incorporation, it still does not appear that the defendant can be held liable. According to the defendant, she was a director in June, 1973. The crucial period in the claim was August 1, 1973, i.e. the date when money had passed hands and the contract entered. That being essentially the case, then it must still be the company who must be held liable and not the defendant because the company had by the time of the contract been incorporated and the defendant was one of its directors. If the defendant acted for the company in the contract, then she must have done so in her capacity as a director. It is settled law that a director is an agent of a company. (*Halsbury's* Vol. 6, 3rd ed. page 421 para 814).

I would, therefore, in the circumstances, dismiss the claim with costs.

Claim dismissed.

Solicitors: *S. Sivasubramanian; Ten Chin Yong & Appaduray.*

SYED ALWI v. DEWAN BAHASA DAN PUSTAKA

[O.C.J. (Vohrah J.) September 1, 1979]
[Kuala Lumpur — Civil Suit No. 2120 of 1978]

Copyright — Declaration of ownership of copyright in play and that defendants might publish it — Agreement to be entered into relating to copyright and payment of royalty — No formal agreement entered into — Play published by defendants — Infringement of copyright — Copyright Act, 1969, ss. 8(1), 13(3) & 14.

In this case the plaintiff signed a declaration acknowledging the receipt of the 1974 literature prize money awarded by the defendants in respect of a play written by him and declaring his ownership of the copyright of the work and agreeing that the defendants might publish it. He also undertook in the declaration to enter into an agreement with the defendants relating to copyright and the payment of royalty. No formal agreement was signed but the play was published by the defendants. The plaintiff claimed damages and an injunction.

Held: in the circumstances the plaintiff's copyright had been infringed by the defendants. The defendants, their servants or agents should be restrained from further publishing or distributing the plaintiff's work and they should pay $10,000 damages and costs to the plaintiff.

CIVIL SUIT.

Tan Jin Chor for the plaintiff.

Halim Ismail for the defendants.

Vohrah J. (delivering oral judgment): The following facts are not disputed. The plaintiff on August 2, 1975 signed the declaration, AB-12, acknowledging the receipt of the 1974 literature prize money of $3,000 awarded by the Dewan Bahasa dan Pustaka in respect of his play, "Tok Perak," and declaring his ownership of the copyright of that work and agreeing that the defendants might publish it. He also undertook in the declaration to enter into an agreement with the defendants relating to copyright and the payment of royalty. No formal agreement in fact was ever signed but sometime in the later part of 1977 the play was published by the defendants.

The plaintiff stated in evidence that the first indication he had that his work had been published by the defendants was when he read a review of the publication in the *Berita Harian* of October 4, 1977. It was only on December 14, 1977 that the defendants notified him by letter (AB-18) of the publication of 5,000 copies of his work. He found missing words, textual errors and errors of punctuation in the work as published. Together with this letter the defendants sent a formal agreement for his signature. The agreement contained a number of provisions to which he took exception and which were contrary to the understanding on certain matters which he had reached with the defendants' then Head of the Literary Development Division, one Kamaluddin Muhammad. This evidence of the plaintiff was unchallenged by the defence. The plaintiff denied that he had ever agreed orally to dispense with the necessity for a written agreement before publication or that he ever agreed to publication before resolution of the terms of the agreement. The only evidence adduced by the defence supported the plaintiff's claim that he had had a discussion with Kamaluddin about his reservations as to its terms and the latter's agreement to accommodate those reservations. Kamaluddin was never produced.